

OCT 1 1983

ALEXANDER L STEVENS,
CLERK

83-549
No.

In the
Supreme Court of the United States

OCTOBER TERM, 1983

MARK ABRAMOFF,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
WISCONSIN SUPREME COURT AND THE
WISCONSIN COURT OF APPEALS,
DISTRICT II

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QUESTION PRESENTED FOR REVIEW

Does the owner of a motor vehicle, charged with possession of contraband discovered within the trunk of the automobile, have standing to challenge an unconstitutional search of the trunk of the automobile when the search occurs at a time and place where the owner is not present?

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**PETITION FOR WRIT OF CERTIORARI TO THE
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DISTRICT II**

Petitioner prays that a writ of certiorari issue to review the order of the Wisconsin Supreme Court entered August 30, 1983 and the decision of the Court of Appeals of Wisconsin, District II, filed July 5, 1983.

OPINION BELOW

The opinion of the Court of Appeals of Wisconsin, District II, was filed on July 5, 1983 and is set forth in the Appendix, pp. App. 1-6. The order of the Wisconsin Supreme Court denying review of the Court of Appeals' decision was entered on August 30, 1983 and is set forth in the Appendix, p. App. 7.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioner was charged with one count of Unlawful Possession With Intent to Deliver a Controlled Substance, to-wit: marijuana, in violation of § 161.01(4), Wis. Stats. by Complaint issued on February 13, 1980 and Information filed on May 1, 1982. A Motion to Suppress was filed on behalf of the petitioner and the State traversed the Motion asserting lack of standing by the petitioner. After submission to the trial court on briefs, the Court held by written decision of March 3, 1981 that the petitioner did not have adequate standing to raise any question concerning the search and seizure. The petitioner requested discretionary review of the decision by the state appellate court

but that review was denied as premature on May 7, 1981, Case Nos. 81-660-CR-LV and 81-661-W, Wisconsin Court of Appeals. There was a waiver of jury by the petitioner and the case was tried before the Court on April 26, 1982. At the conclusion of the trial the Court found the petitioner guilty and on September 2, 1982 sentenced the petitioner to a term of confinement of four years in the Wisconsin State Prison. Petitioner timely perfected appeal to the Court of Appeals of Wisconsin, District II and was granted bond pending appeal by the trial court which expressly observed that the issue raised on appeal was substantial and of first impression. The Court of Appeals affirmed the conviction by decision dated July 5, 1983, appendix, pp. App. 1-6. A petition to review was filed with the Wisconsin Supreme Court and denied on August 30, 1983. From that decision the petitioner now requests the United States Supreme Court to grant this Petition for Certiorari. Further facts will be presented in the following argument of Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

I.

THE CASE INVOLVES AN ISSUE OF FIRST IMPRESSION CONCERNING STANDING TO CHALLENGE SEARCHES OF AUTOMOBILES.

The charge against the petitioner resulted from an incident purported to have occurred on February 12, 1980. The controlled substance, marijuana, had been transported through the State of Kentucky some few days prior to February 12, 1980 in an automobile owned by the petitioner. As the automobile moved through the State of Kentucky it was operated by persons other than the petitioner and as it passed through Kentucky a law enforcement officer stopped the automobile and conducted a warrantless non-consensual search allegedly without any probable cause. During the course of the warrantless non-consensual search contraband was discovered in the trunk and seized. Waukesha County law enforcement officers were contacted, proceeded to Kentucky, directed the operator and the passenger of the automobile to return to Waukesha County and accompanied them. When the vehicle returned to Waukesha County the contraband was transported by the operator and the passenger to petitioner. As is recited in the complaint, the law enforcement officers then apprehended the petitioner with the contraband in another vehicle also owned by him.

As the Court of Appeals notes in its decision there is little question but that the petitioner would have had standing to challenge the search and seizure prior to the decision of the United States Supreme Court in *United*

States v. Salvucci, 448 U.S. 83 (1980). Under the prior controlling decision of *Jones v. United States*, 362 U.S. 257 (1960) the petitioner would have had "automatic standing"¹ due to his status as a defendant. The Court of Appeals found, however, that under *Salvucci*, *Rawlings v. Kentucky*, 448 U.S. 98 (1980), *State v. Cribbs*, 406 So. 2d 1295 (Fla. App. 1981) and *United States v. Barry*, 673 F.2d 912 (6th Cir. 1982) the petitioner in the case at bar had no standing because—although he owned the vehicle in which the contraband was discovered—the vehicle was in the custody of and under the control of the third parties at the time it was searched and therefore the petitioner had no reasonable expectation of privacy in the vehicle.

There is no question that automobiles and automobile searches do involve Fourth Amendment problems that are not identical with those of real property. See *Rakas v. Illinois*, 439 U.S. 128 (1978), *Chambers v. Maroney*, 399 U.S. 42 (1970), *U.S. v. Chadwick*, 433 U.S. 1 (1977), *Cardwell v. Lewis*, 417 U.S. 583 (1974), *Cady v. Dombrowski*, 413 U.S. 433 (1973) and *State v. Prober*, 98 Wis.2d 345, 297 N.W.2d 1 (1980).

The sanctity of an automobile is admittedly somewhat less than the sanctity of one's home or premises over which one has dominion or control by ownership or leasehold. Cf. *Carroll v. U.S.*, 267 U.S. 132 (1925), *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), *U.S. v. Ross*, 50 L.W. 4580 (1982), *Robbins v. California*, 453 U.S. 420

¹ The "automatic standing" test has been rejected by the Wisconsin Supreme Court as a matter of state constitutional protection also. See *State v. Callaway*, 106 Wis.2d 503, 317 N.W.2d 428 (1982). Although the dissent views the holding as obiter dicta. See 106 Wis.2d at 541-544.

(1981), *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *South Dakota v. Opperman*, 428 U.S. 364 (1976). That there is such a distinction is, however, a far cry from a determination that the owner of an automobile has no legitimate expectation in the privacy of that vehicle—*whether or not he is in the automobile at the time of the search*.² The critical distinction in the case at bar from all of those prior decisions that have narrowed and eroded the "automatic standing" rule is that to date the United States Supreme Court has not divested an owner of a vehicle of *standing* to challenge an illegal search thereof, when that ownership is coupled with a charge against the owner of violation of the criminal laws for possession of the contraband discovered as a result of the search. There can be no meaning to the Fourth Amendment if a defendant so situated can be barred from moving to suppress an illegal search. To so hold is to emasculate the Fourth Amendment by defining its interests in terms of propinquity and to say that Fourth Amendment rights are forfeited when persons are not present in their automobiles or homes. The logical extension of the rule would be to hold that the police may conduct general searches as long as the persons whose property, home or automobiles they search are not present at the time of the search. It is hoped that such a rule could never be adopted consistent with the Bill of Rights.

² Cf. *State v. Callaway*, 103 Wis.2d 389, 391 (1981), 308 N.W.2d 897, rev. on other grounds 106 Wis.2d 503, 317 N.W.2d 428 (1982) where the state attempted to advance a contrary position that a *non-owner* had no legitimate expectation of privacy. That argument makes more sense than the one advanced in the instant case.

II.

**THE DECISION OF THE STATE COURT
ERRONEOUSLY INTERPRETS THE
UNITED STATES CONSTITUTION.**

The trial judge implicitly recognized the illogic of holding that an owner of a vehicle did not have standing to challenge a search, when he observed:

"Justice Powell, in his concurring opinion in *Rakas*, in which the question was standing concerning an automobile search ('albeit' passenger's claim as opposed to the owner's claim) . . ."

The albeit is critical. There is a valid distinction between the Fourth Amendment rights attendant to passengers or guests as distinguished from owners. That factor is an effective component of the legal principal and a real distinction. That ownership is a critical factor can be seen from *Robbins v. California*, *supra* where the person of the operator, defendant was searched and *Arkansas v. Sanders*, *supra* where the automobile was a taxicab and the defendant merely a passenger. However, he *owned* the suitcase which was in the trunk and the Supreme Court declared a *warrant was necessary to search the suitcase*. Standing was so obvious as not to merit comment. Also see *State v. McDugal*, 68 Wis.2d 399, 228 N.W.2d 671 (1975) and *State v. Callaway*, *supra*. To fail to acknowledge the ownership distinction is to cut at the very heart of the Fourth Amendment.

The court may well have marched to what it viewed as the logical conclusion of the case law but, if indeed that is the logical conclusion of the case law, it is respectfully submitted, that the case law insofar as it leads to that conclusion is erroneous and in conflict with the possessory Fourth Amendment rights of the citizens of the United

States. It is illogical and constitutionally absurd to hold that the owner of a vehicle has no expectation of privacy with respect to the inner compartments and trunk of a vehicle especially in instances where contraband is discovered therein as the consequence of an illegal search *and the owner is charged with possession of that contraband.* The *Jones* rule of "automatic standing" may have been simplistic and absolute. Under it, however, such a transparent violation of the Fourth Amendment would not be recognized or tolerated. The holding in the case at bar is more than a dilution of rights, it is an extinction of rights. The decision of the Court of Appeals of Wisconsin, District II is a totally erroneous interpretation of the Fourth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons certiorari should be granted and the order of the Wisconsin Supreme Court dated August 30, 1983 and the decision of the Court of Appeals of Wisconsin, District II dated July 5, 1983 should be reversed.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

APPENDIX

APPENDIX A

No. 82-1679-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN.

Plaintiff-Respondent,

v.

MARK K. ABRAMOFF,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha county: NEAL NETTESHEIM, Judge. Affirmed.

Before Foley, P.J., Dean and Cane, J.J.

CANE, J. Mark Abramoff appeals his conviction, after a non-jury trial, of possessing marijuana with intent to deliver in violation of sec. 161.01(4), Stats. The issues are (1) whether Abramoff lacks standing to challenge the search of his car, which was done while his companions were driving the car from Florida to Wisconsin, and (2) whether the evidence supports the court's conclusion of no entrapment. Because the trial court correctly concluded that Abramoff had no legitimate expectation of privacy in the seized car and because there is sufficient credible evidence to support the trial court's conclusion of no entrapment, we affirm.

At the suppression hearing, Abramoff testified that in early February, 1980, he permitted his roommate, Mike Hagen, to drive his car to Florida. Abramoff later flew to Florida and met his other roommate, Sonny Grauer,

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and Hagen. Abramoff stated that he observed Hagen place approximately ninety-eight pounds of marijuana into his car's trunk. He then allowed Hagen and Grauer to drive his car back to Wisconsin while he returned by plane. Abramoff acknowledged that he owned the marijuana and the car.

Authorities stopped Hagen and Grauer in Kentucky, where they seized the marijuana in the car. Two Waukesha detectives flew to Kentucky and interviewed Hagen and Grauer, who stated that Abramoff instructed them to drive his car back to their Wisconsin residence with the marijuana. The detectives instructed them to deliver the marijuana as had been agreed upon in Florida. The detectives observed Hagen and Grauer return the car to their Wisconsin residence, where Abramoff moved the marijuana from his car to a jeep. The detectives later arrested Abramoff and, after obtaining a search warrant, seized the marijuana from the jeep.

Abramoff challenged the seizure of the marijuana in Kentucky. The trial court concluded that under the totality of the circumstances, Abramoff had no reasonable or legitimate expectation of privacy in his car when the marijuana was seized in Kentucky.

Abramoff contends that he has automatic standing to challenge the Kentucky search of his car because he owns the property searched and is charged with a crime for possessing the seized items. He argues that his fourth amendment right under the United States Constitution is not forfeited simply because he was not present during the search. We disagree.

The "automatic standing" rule of *Jones v. United States*, 362 U.S. 257 (1960), has been abolished by the United States Supreme Court in *United States v. Salvucci*,

448 U.S. 83 (1980), and by the Wisconsin Supreme Court in *State v. Callaway*, 106 Wis.2d 503, 519-20, 317 N.W.2d 428, 437 (1982). While property ownership is a factor to be considered in determining whether an individual's rights under either the United States or Wisconsin Constitutions have been violated, an illegal search only violates the rights of those who have a legitimate expectation of privacy in the searched area. *Salvucci*, 448 U.S. at 91-92.

The primary objective of the fourth amendment is protection of privacy. *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974). The question before the trial court and on appeal is whether Abramoff had a legitimate expectation of privacy in his vehicle that was searched in Kentucky. On appeal, the trial court's factual findings will be sustained unless clearly erroneous. Section 805.17(2), Stats. The trial court's conclusion, however, that these facts did not give rise to an individual's legitimate expectation of privacy is a question of law, which we independently review. *State v. Wisumierski*, 106 Wis.2d 722, 734, 317 N.W.2d 484, 490 (1982).

Whether Abramoff had a legitimate expectation of privacy depends on a variety of factors, including those our supreme court listed in *State v. Fillyaw*, 104 Wis.2d 700, 711-12 n. 6, 312 N.W.2d 795, 801 n. 6 (1981):

- (1) Whether one had a property interest in the premises;
- (2) Whether one is legitimately (lawfully) on the premises;
- (3) Whether one had complete dominion and control and the right to exclude others;
- (4) Whether the person took precautions customarily taken by those seeking privacy;

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- (5) Whether the property was put to some private use;
- (6) Whether the claim of privacy is consistent with historical notions of privacy.

Here, the trial court found that Abramoff owned the searched car and seized marijuana. Abramoff had surrendered complete dominion and control of his vehicle and its contents to Hagen and Grauer for a journey of substantial distance and time. He was not present when the car was searched. These factual findings are supported by the record and are therefore not clearly erroneous.

We have not found, nor have the parties cited, any Wisconsin cases where a defendant owns the searched car and has a possessory interest in the seized contraband, but has completely surrendered dominion and control of the car and its contents to third parties for a substantial time and distance. In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the defendant entrusted drugs to a companion who placed them in her purse. The authorities subsequently seized the drugs from the purse. The United States Supreme Court concluded that the defendant did not have a reasonable expectation of privacy in the purse even though he remained in the immediate presence of the companion. It must be noted, however, that in *Rawlings*, the defendant did not own the purse.

Other courts have considered factual situations similar to this case. Although their decisions are not binding on this court, we find them persuasive. In *State v. Cribbs*, 406 So.2d 1295 (Fla. App. 1981), the police responded to a call reporting a prowler and found a car with a driver matching a witness' description. The man was arrested, and the police discovered a shotgun under the driver's seat. Cribbs, who owned the car, was not present, but was

charged with armed robbery. The court concluded that because Cribbs allowed the other man to exclusively possess his car, he had no expectation of privacy and therefore had no standing to challenge the search of his car. In *United States v. Barry*, 673 F.2d 912, 919 (6th Cir. 1982), the court held that a defendant has no reasonable expectation of privacy in a package of drugs being sent through a private express company. The court noted that when a defendant consigns drugs to a third person for shipment, he has released all control over the items that could lead to his arrest if they are exposed.

In this case, Abramoff gave complete control of his car and its contents to third parties for a substantial time and distance. The possibility that the drugs might be exposed because of an accident or as a result of the third parties' conduct is a risk that Abramoff must have or should have considered when deciding to use the third parties' services. The marijuana was placed in his car's trunk without any special precautions. His decision to surrender control over his automobile and the marijuana could only serve to reduce his expectation of privacy. We therefore agree with the trial court's conclusion that under these circumstances, Abramoff had no reasonable or legitimate expectation of privacy in the car at the time of the search in Kentucky.

Abramoff also argues that there was entrapment because the marijuana was transported from Kentucky to Wisconsin at the instance of the law enforcement officers and under their control for the express purpose of placing the marijuana in his possession. The entrapment defense is based on the theory that an accused should not be convicted if the criminal design originated in the government agent's mind and, except for the agent's urging, the accused would not have committed the crime. There is no

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entrapment when the government agent merely furnishes an opportunity for the commission of the offense. *State v. Hochman*, 2 Wis.2d 410, 414-15, 86 N.W.2d 446, 449 (1957). The burden of proof is on the defendant to show by a preponderance of the evidence that the inducement occurred, and the state must then prove beyond a reasonable doubt that the accused had a prior disposition to commit the crime. *Hawthorne v. State*, 43 Wis.2d 82, 91, 168 N.W.2d 85, 89 (1969).

The evidence supports the trial court's findings that the plan to possess marijuana with intent to deliver originated with Abramoff and that he was predisposed to commit the offense. The detectives in Kentucky merely told Hagen and Grauer to deliver the marijuana to Abramoff's residence as originally planned. Abramoff also admitted to previous purchases for resale of large quantities of marijuana ranging in size from 80 to 195 pounds. Additionally, the trial court rejected as incredible Abramoff's testimony that he had no commercial interest in transporting the marijuana and that he was attempting to dispose of the marijuana on the inducements of Hagen and Grauer rather than intending to sell it. It is the trial court's responsibility to determine Abramoff's credibility as a witness and the weight to be given his testimony. *State v. Kennedy*, 105 Wis.2d 625, 634, 314 N.W.2d 884, 888 (Ct. App. 1981). Once the trial court rejected Abramoff's testimony, there was no evidence to support his entrapment argument. The court therefore correctly concluded that there was no entrapment.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

APPENDIX B

Office of the Clerk
SUPREME COURT
State Of Wisconsin

Madison, August 30, 1983

To

James Kieffer
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The Court today announced an order in your case as follows:

No. 82-1679-CR *State v. Mark K. Abramoff*

The court having considered defendant-appellant-petitioner Abramoff's petition for review of an adverse decision of the court of appeals, district II/III, dated July 5, 1983,

IT IS ORDERED the petition for review is denied, without costs.

/s/ *Marilyn L. Graves*
Clerk of Supreme Court.